IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A.,

Petitioner,

v.

WILLIAM T. DENTZER, JR., Superintendent of Banks of the State of New York, and United States of America,

Respondents;

and

No. 1595

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, et al.,

Petitioners,

v.

WILLIAM T. DENTZER, JR., Superintendent of Banks of the State of New York, and United States of America,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement	1
Argument:	
(a) The petitions should be denied for want of a substantial Federal question	7
(b) The proceedings below fully satisfy due process	9
Conclusion	13
Appendix	15

Cases Cited

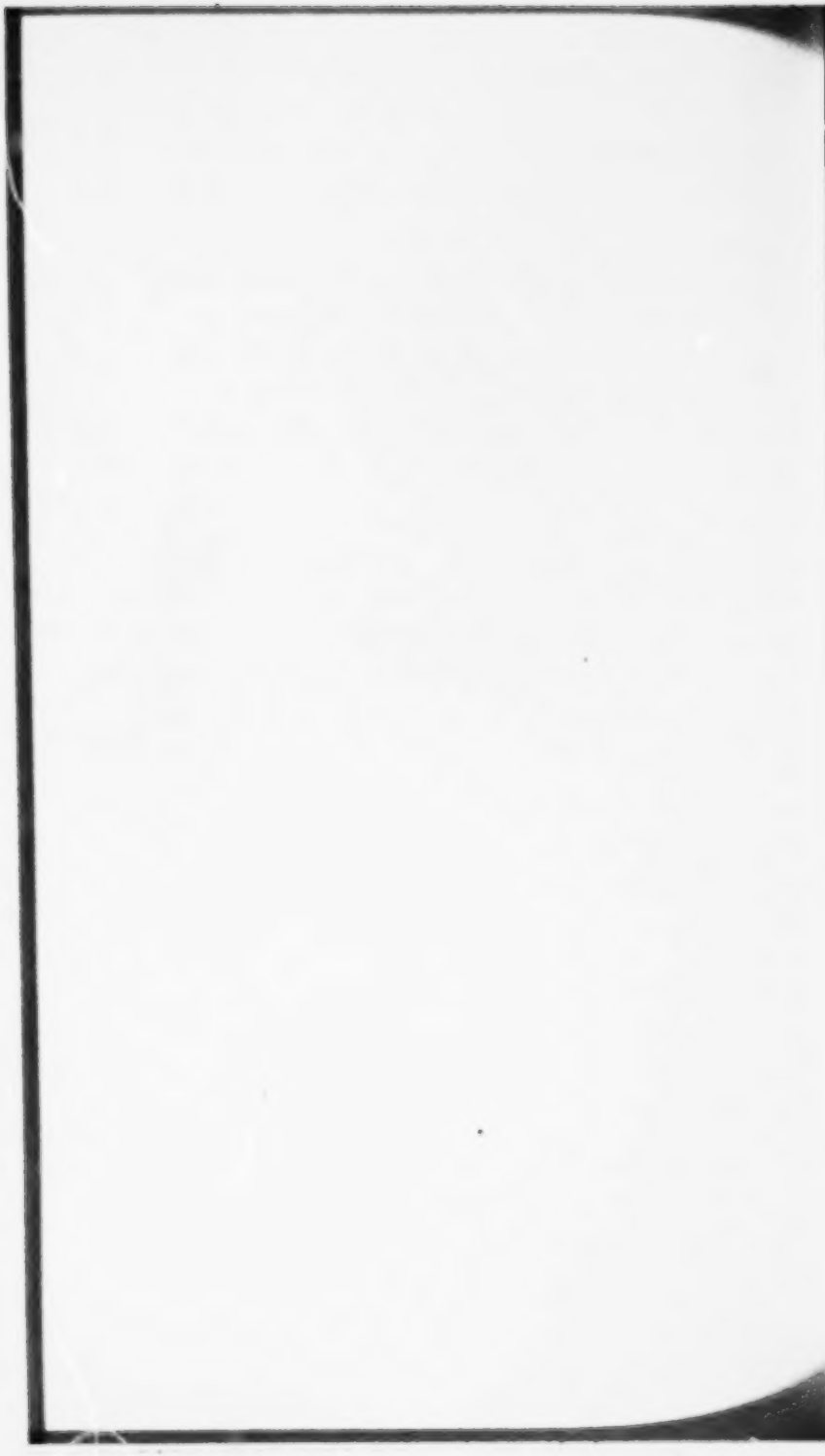
Florida Trailer and Equipment Company v. *Deal*, 284 F 2d 567 (5th Cir. 1960)	7, 8
Nortz v. *United States*, 294 U. S. 317 (1935)	13
Perry v. *United States*, 294 U. S. 330 (1935)	13
Protective Committee v. *Anderson*, 390 U. S. 414 (1968)	9, 10

United States Constitution

Amendment Fifth	6
Amendment Fourteenth	6

Statutes Cited

New York Banking Law	
Sec. 606	2
Sec. 607	2
Secs. 620-25	3
Sec. 622	3
Sec. 623	3
Sec. 625	3



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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Question Presented

Whether the proceedings below upon which the courts of the State of New York approved the compromise of a claim in the liquidation of a New York bank denied petitioners due process.

Statement

Pursuant to his statutory duty and authority, William T. Dentzer, Jr., the Superintendent of Banks of the State

of New York (Superintendent Dentzer and his predecessor as Superintendent of Banks, Frank Wille, are hereafter referred to as "Superintendent") is engaged in the liquidation of the New York branch of a Lebanese bank* which closed its doors over three and a half years ago. Acting pursuant to §606 of the New York Banking Law, the Superintendent took possession of Intra Bank's business and property in New York on October 15, 1966. Although §607 gave Intra Bank the right to contest the Superintendent's action, no such litigation was filed. Under §606 the Superintendent thus acquired title to, and the duty to marshal, all of IBNY's business and property wherever located, and all of Intra Bank's business and property located in New York. Accordingly the Superintendent commenced a variety of actions against various IBNY and Intra Bank debtors (R55-7)**; he also initiated litigation to clear his title to an office building located at 680 Fifth Avenue in New York City (R 54).†

Out of the assets thus collected, the Superintendent is directed to pay the claims of depositors and creditors of IBNY. He is specifically forbidden to pay any claim by Intra Bank or any of its other branches or subsidiaries, or of anyone else whose claim would not be an enforceable legal obligation against IBNY if it were a separate and independent legal entity.†† If, but only if, all depositors

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* The New York branch will be referred to as "IBNY". The home office in Lebanon will be referred to as "Intra Bank".

** References are to the record on appeal in the New York Court of Appeals.

† In 1968 the Superintendent sold the building for approximately $15,250,000 subject to valid mortgages of approximately $5.3 million.

†† Claims of depositors and creditors of IBNY are referred to in §606 of the Banking Law as "preferred" claims. In a sense the term "preferred" is misleading because "preferred" claims are the only claims the Superintendent can recognize at all. Accordingly, we shall refer to "preferred" claimants as "depositors and creditors of IBNY".

and creditors of IBNY have been paid in full together with statutory interest, any surplus after the payment of expenses is to be made available to the home office or its domiciliary liquidator.

After he had finally determined to liquidate IBNY, the Superintendent set in motion the statutory machinery for the filing of claims (Banking Law, §§ 620-25). The total of all claims timely filed plus the accounts payable on IBNY's books was slightly over $32 million, including a claim of over $21 million filed by the Commodity Credit Corporation ("CCC") (R 53, 71) based on 53 so-called letters of credit issued by IBNY.

The Superintendent included CCC's claim in the list of claims filed by him in his office and in the office of the Clerk of New York County as required by §622 of the Banking Law.* The 646 claims filed and the 447 accounts payable were individually examined; the Superintendent accepted claims and accounts totalling approximately $900,000 and rejected the remainder, including CCC's claim. Of the rejected claims, almost $4 million were abandoned; the remainder became the subject of litigation pursuant to §625 of the Banking Law (R 433).

Thus, the valid claims together with those currently in litigation amount to something over $6.5 million (R 433).** The assets in the Superintendent's possession which were cash or cash equivalents at December 31, 1969 came to approximately $12.2 million.

The statutes which control the liquidation are, of course, a part of a comprehensive scheme of regulations enacted

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* Under §623 of the Banking Law any interested party, including petitioners here, might have objected to CCC's claim. None did so (R 51).

** A substantial portion of the claims in litigation represent no more than alleged set-offs against actions commenced by the Superintendent to collect assets.

by the State of New York with respect to local banks and local branches of foreign banks within its jurisdiction. It is axiomatic that the very purpose of bank regulation is the protection of local depositors and not the protection of shareholders or the foreign home offices of local branches. The statutory scheme of liquidation under which the Superintendent must operate makes it plain that his primary obligation is to look out for the rights of the New York depositors and creditors who dealt with IBNY in reliance upon the license he granted and the regulations he administers.

It is undisputed that if the CCC's claim were to be sustained in litigation, the depositors and creditors of IBNY would be wiped out entirely. Upon advice of counsel, the Superintendent rejected the CCC's claim and entered into protracted discussions with the CCC which ripened into negotiations looking toward a compromise (R 57). The result was the Agreement of Compromise which has now been reviewed and unanimously approved by thirteen judges of three New York courts.

So far as the Superintendent is concerned, the essential feature of the Compromise is that all depositors and creditors of IBNY are to be paid in full before the CCC is paid anything (R 67-8). In return, the Superintendent will assign to the CCC certain causes of action he has asserted in the course of marshalling assets. The Agreement of Compromise was formally executed between the Superintendent and the United States (acting for its agency the CCC) as of February 1, 1968. On February 16 the Superintendent petitioned Special Term of the New York Supreme Court to approve the Compromise and obtained an order to show cause why it should not be approved, which was returnable at a hearing held on March 27, 1968 (R 48). Elaborate provisions for service of the order were

provided and complied with and a number of objectants, including petitioners Intra Bank and the Insurers,* filed papers and appeared in opposition to the approval of the Compromise.

Neither Intra Bank nor the Insurers made or could make any assertion that its objection to the proposed Compromise stems from any status as a depositor or creditor of IBNY. Petitioner Intra Bank asserted prejudice from the Compromise on the ground that the CCC's claim is so large that its acceptance makes it clear, as it probably does, that there will be no surplus to be made available to the home office. Petitioners the Insurers asserted that they are creditors of the home office of Intra Bank or other Intra Bank branches (not IBNY), with the added feature that they obtained attachments upon any surplus remaining after liquidation "after being returned to defendant [Intra Bank] or such other person as a court may designate as provided in Chapter XIII of the Banking Law" (R 83-4).

Thus it is apparent that the real adversaries here are the depositors and creditors of IBNY on the one hand, and Intra Bank and those claiming through it on the other. Final approval of the Compromise means that the depositors and creditors of IBNY will be paid in full. Its disapproval would create a risk that the CCC could establish its claim and that the other depositors and creditors of IBNY would be paid nothing.** In essence, petitioners seek to require the Superintendent to take an unnecessary gamble with the rights of parties whom the New York statute directs him to prefer.

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* The "Insurers" collectively includes American International Underwriters Corporation, American International Underwriters Mediterranean, Inc., Middle East Assurance and Reassurance Company, S.A.L., Firemen's Insurance Company of Newark, New Jersey and American Life Insurance Company.

** Unlike depositors in most American banks, depositors in IBNY and other local branches of foreign banks are not insured by the Federal Deposit Insurance Corporation.

At the hearing in Special Term various objectants requested discovery and thereafter the Superintendent submitted a lengthy affidavit with exhibits showing in great detail a typical transaction involved in the CCC's claim (R 267-337). Thereafter, in response to a suggestion that the transaction might not have been typical, the Superintendent submitted a further lengthy affidavit with exhibits dealing with substantially all of the transactions (R 338-433) and the United States also submitted an affidavit (R 434-7).

The first opinion of Special Term approving the Compromise was issued on June 12, 1968. Thereafter, Intra Bank moved for reargument and submitted additional affidavits, which came into the record without objection (R 462-6). The second opinion of Special Term approving the Compromise was issued September 17, 1968. After the matter was fully briefed and argued, the approval was unanimously affirmed by the Appellate Division, First Department on December 17, 1968. Leave to appeal was obtained on March 6, 1969 but the appeal was perfected too late to be heard until the fall. Again after full briefs and oral argument, the New York Court of Appeals unanimously affirmed on October 30, 1969. A few days before expiration of the time to file a petition in this Court for a writ of certiorari, Intra Bank applied for reargument and to amend the remittitur. On February 19, 1970 the Court of Appeals denied reargument and amended the remittitur as follows:

> "Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Whether the rights of appellants under the Fifth and Fourteenth Amendments were denied. Appellants argued that the failure to hold a plenary hearing denied them due process of law. The Court of Appeals considered this contention and held that, on this record, the failure to order a plenary hearing did not deny due process of law to appellants."

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ARGUMENT

The petitions should be denied for want of a substantial Federal question.

In its motion in the New York Court of Appeals to amend the remittitur and its Brief in support thereof (reprinted in pertinent part in the Appendix to this brief), petitioner Intra Bank sought to interject into the case a number of Federal questions. In this endeavor it was unsuccessful, and the only Federal question available for review is that actually referred to by the Court of Appeals in the amended remittitur—the procedural adequacy of the proceedings in Special Term upon which the Compromise was judicially approved.

Because the reasons for granting the writ advanced by both petitioners dwell so extensively on matters unrelated to the Federal question, we submit the following preliminary comments before addressing ourselves to that Federal question:

First, for obvious reasons it is inappropriate for the Superintendent to argue the strength of the CCC's claim upon the merits. As it was in the New York courts, that subject shall be left to the attention of the brief filed on behalf of the United States. It is sufficient for the Superintendent to say that the CCC's claim obviously presents complex, novel and sharply contested legal issues.

Second, as they did in the New York courts, petitioners approach this matter as though it involved an adverse judgment upon the merits of the controversy between the Superintendent and the CCC. It involved no such thing. The following language from *Florida Trailer and Equipment Company* v. *Deal*, 284 F 2d 567 (5th Cir. 1960), makes the point:

> "This appeal really presents the question whether there was such an abuse of discretion in the Ref-

eree's approval of a proposed settlement that the District Court erred in not setting it aside. We emphasize *really* because the Objecting Creditor (now appellant) in the hearing before the Referee, on the petition of review in the District Court and again here in briefs and arguments, persists in treating the matter as though this were an appeal from a decision on the intrinsic merits in an initial adversary proceeding. The two are quite different." (Emphasis in original).

• • •

"[T]he approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. *But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise.* This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise." (284 F 2d at 568, 571) (Emphasis added).

Third, this proceeding arose upon the petition of the Superintendent of Banks of the State of New York for approval by a New York court of a compromise made in the course of the liquidation of a New York bank which existed and was regulated solely by virtue of the New York Banking Law. The Compromise was of a controversy between himself and a claimant to assets in his possession. The mere fact that the claimant happens to be an agency

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of the Federal Government does not, of course, mean that judicial approval of the Compromise determines any Federal question. And even if the controversy necessarily involved a Federal question*, still judicial approval of its compromise does not determine any Federal question.

With this background, we turn to the only Federal question here involved.

The proceedings below fully satisfy due process.

The standard used by Special Term in considering the Agreement of Comprise was set forth recently in *Protective Committee* v. *Anderson,* 390 U. S. 414 (1968), which reversed a prior approval of a compromise.** There the Court said, as quoted by Special Term (R 488-9):

> "Compromises are 'a normal part of the process of reorganization.' *Case* v. *Los Angeles Lumber Prods. Co. Ltd.,* 308 U. S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time, however, it is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court. *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436 (1933) * * * There can be no informed and independent judgment as to whether a proposed

* A judgment on the merits in favor of the CCC's claim might be supported on alternative State grounds. A judgment on the merits against the CCC's claim would probably involve a Federal question.

** The *Anderson* case involved two separate questions. The first was the propriety of certain agreements whereby the trustee compromised the claims of, and his counterclaims against, an alleged creditor. The second question was whether a reorganization proposed by the Trustee was fair and equitable. In the case at bar the Superintendent is engaged in a liquidation, not a reorganization, hence the second point in *Anderson* is not here involved.

> compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." (390 U. S. at 424-5).

As to the propriety of the compromise involved in *Anderson,* this Court reversed because:

> "The record before us leaves us completely uniformed as to whether the trial court ever evaluated the merits of the causes of actions held by the debtor, the prospects and problems of litigating those claims, or the fairness of the terms of compromise. More than this, the record is devoid of facts which would have permitted a reasoned judgment that the claims of actions should be settled in this fashion." (390 U. S. at 440-1).

Here an experienced and careful Justice at Special Term has specifically stated that (R 490):

> "The court 'has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated * * * to the end that a true appraisal be made of [CCC's] chances of success upon the issues presented, and a correlative conclusion drawn as to the fairness and reasonableness of the proposed compromise.'"

Although we do not suggest that the record here is all that would be required for a full and final determination

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on the merits of the controversy between the Superintendent and the CCC, the authorities cited above make it clear that avoidance of the expense and hazards of making such a record is a good part of the policy of the law which favors compromises. Nevertheless, there is a record here, encompassing almost 500 pages exclusive of opinions below, which contains in very considerable detail the basic facts upon which the controversy is based.

There is no substance to petitioners' claims that they were improperly denied a plenary hearing or discovery. With respect to the hearing, the Superintendent brought on his petition for approval of the Agreement of Compromise by order to show cause. In their responses to such petition, neither Intra Bank nor the Insurers made any request for a plenary or evidentiary hearing (R. 95-8; 244-6). In its initial and formal objection to the Agreement of Compromise, Chase Manhattan Bank ("CMB")* did request a "full evidentiary hearing". However, there was no specification of the matters to be dealt with at such a hearing and CMB made no offer of proof.

At the hearing on the order to show cause held in Special Term on March 27, 1968, CMB made no mention of any further hearing; petitioners Intra Bank and the Insurers also remained entirely silent on the subject. In the months following the hearing the parties, including the Superintendent, CCC and Intra Bank, submitted the evidence which makes up the record upon which Special Term approved the Agreement of Compromise. At no time did CMB suggest to Special Term that such record

* CMB pursued its objection to the New York Court of Appeals. However, it did not seek reargument or to amend the remittitur there. Statements under Rule 21 of this Court by petitioners Intra Bank and the Insurers state that CMB has no further interest in this proceeding. Petitioner Intra Bank attributes such lack of interest to the asserted fact that CMB "has settled or is about to settle" its dispute with the Superintendent and the United States. Such attribution is entirely inaccurate.

was inadequate or make any further request for additional hearings.

It was not until after Special Term's initial decision approving the Compromise that petitioner Intra Bank, in its motion for reargument and rehearing (R 439), made a request for any further hearings. Petitioners the Insurers never made any such request of Special Term. At no time did anyone objecting to the Compromise tender any witness or make any offer of proof.

With respect to discovery, prior to and during the hearing on March 27, 1968, petitioners Intra Bank and the Insurers indicated a desire for discovery (R 29-31; 101-06; 250-1). In response thereto the Superintendent submitted two lengthy affidavits with attached exhibits (R 267-337; 338-433) which disclosed in great detail the transactions upon which the CCC's claim is based; the Superintendent further stated (in his Memorandum in Reply to Objections, served on petitioners on April 19, 1968) that if any objectant required further discovery he would have no objection to such discovery on a basis supervised by the Court. After this offer petitioners made no further request for discovery in Special Term. However, CCC thereafter submitted an affidavit with exhibit (R 434-7) and, following the motion for reargument and rehearing, CCC submitted a further affidavit with exhibit (R 467-74).

But beyond all of this, the record (R 267-337) makes it perfectly clear that petitioner Intra Bank had in its possession full information about the transactions on which CCC's claim is based and about whatever the relations might have been between Intra Bank and the other Lebanese parties to the transactions. It had the fullest possible opportunity to present any evidence it desired to Special Term, and indeed continued to present evidence without objection upon its motion for reargument and rehearing (R 442-9 *passim;* 452-61; 463-6).

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Petitioners the Insurers still are not able to identify any issue upon which they wish to present evidence or have a hearing. Petitioner Intra Bank now suggests four such issues (Intra Bank Petition, pp. 13-14), only the last two of which require comment.

As to the question of Intra Bank's insolvency, the record contains a flat and undisputed admission by Intra Bank, ratified by the judgment of a Lebanese court, that its capital has been "totally lost" (R 219, 461). This is a perfectly sound definition of balance sheet insolvency, and Intra Bank proffers no evidence to rebut it.

As to the question of the Beirut Protocol, petitioner Intra Bank was permitted to put into evidence, without objection, whatever evidence it has to support its bizarre interpretation of that agreement (R 442-9; 452-66). There is no suggestion as to what might be added at any further hearing. The short answer to petitioner Intra Bank's argument on the Beirut Protocol is that, if Intra Bank is aggrieved by any alleged breach of the agreement by CCC, its proper remedy is to sue the CCC for any damages occasioned by such breach. The only cases it cites are the gold clause cases, *Perry* v. *United States,* 294 U. S. 330 (1935) and *Nortz* v. *United States,* 294 U. S. 317 (1935) which stand simply for the proposition that, under certain circumstances, CCC might be liable for breach of contract as though it were a private party.

Thus, petitioners have had the fullest opportunity to present evidence, have had extensive discovery, and declined by silence an invitation for further discovery before the record was closed in Special Term. In these circumstances, the Federal question belatedly tendered by petitioners is without substance.

Conclusion

The depositors and creditors of IBNY have been waiting for over three and one half years for the money due them. The Superintendent has the money to pay them, and the

Agreement of Compromise pursuant to which he can pay them is already over two years old. The controversy between the CCC and the Superintendent which is settled by the Agreement of Compromise involves many difficult and novel questions which were thoroughly considered by the Superintendent before he agreed to settle. Under the settlement the depositors and creditors of IBNY are fully protected and petitioner Intra Bank is thus relieved of its debts to a whole class of its creditors. On its part, the United States gives up its claim to a substantial amount of money to which it stoutly maintains it is entitled under the law.

The opinions of Special Term manifest a careful and detailed consideration of all of the issues and arguments involved, and all the consequences of the litigation which would follow disapproval of the Agreement of Compromise. Special Term's determination has been reviewed and unanimously affirmed by the Appellate Division, First Department and by the Court of Appeals.

The writ should be denied.

Respectfully submitted,

New York, New York
May 29, 1970

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APPENDIX

Notice of Motion for Reargument and to Amend Remittitur

Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF THE PETITION

of

FRANK WILLE, as Superintendent of Banks of the State of New York, for approval, pursuant to § 618(1) of the New York Banking Law, of the Agreement of Compromise between petitioner and the Commodity Credit Corporation, an agency and instrumentality of the United States of America.

INTRA BANK, S.A., AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, AMERICAN INTERNATIONAL UNDERWRITERS MEDITERRANEAN, INC., MIDDLE EAST ASSURANCE AND REASSURANCE COMPANY S.A.L., FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, AMERICAN LIFE INSURANCE COMPANY and THE CHASE MANHATTAN BANK (National Association),

Respondents-Appellants,

against

FRANK WILLE, Superintendent of Banks of the State of New York,
Petitioner-Respondent,

and

UNITED STATES OF AMERICA
Respondent-Respondent,

and

MIDDLE EAST AIRLINES and PEHLE, REIMER, LUXFORD & NAIDEN,

Respondents.

Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF THE PETITION

of

FRANK WILLE, as Superintendent of Banks of the State of New York, for approval, pursuant to § 618(1) of the New York Banking Law, of the Agreement of Compromise between petitioner and the Commodity Credit Corporation, an agency and instrumentality of the United States of America.

INTRA BANK, S.A., AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, AMERICAN INTERNATIONAL UNDERWRITERS MEDITERRANEAN, INC., MIDDLE EAST ASSURANCE AND REASSURANCE COMPANY S.A.L., FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, AMERICAN LIFE INSURANCE COMPANY and THE CHASE MANHATTAN BANK (National Association),

Respondents-Appellants,

against

FRANK WILLE, Superintendent of Banks of the State of New York,
Petitioner-Respondent,

and

UNITED STATES OF AMERICA
Respondent-Respondent,

and

MIDDLE EAST AIRLINES and PEHLE, REIMER, LUXFORD & NAIDEN,
Respondents.

BRIEF OF APPELLANT INTRA BANK, S.A.

• • •

The Remittitur should be Recalled and Amended

Intra contended in its brief and on oral argument that under 31 U.S.C. Section 191 and the law of the United States as laid down by the Supreme Court in *Massachusetts v. United States*, 333 U. S. 625 (1948), that the CCC had no conceivable claim to which it was entitled to priority, and hence had nothing to compromise.

The Supreme Court expressly rejected Intra's contention. However, if Intra's contention is correct, then the orders of the Courts below should have been reversed by this Court. Necessarily then, this Court decided that question adversely to Intra. Accordingly, the remittitur should be amended to provide that this federal question was presented to, and necessarily decided adversely to Intra by this Court.

Intra contended that inasmuch as CCC's claim was predicated on express contracts, as matter of federal law (*U. S. v. Marxen*, 307 U. S. 200 (1938), no claim for restitution or in quantum meruit could be considered as a basis for the settlement. The Supreme Court rejected Intra's contention (498-9).

It may be that this Court did not approve the Supreme Court's reliance on a restitution theory in order to approve the compromise. However it seems perfectly clear that the CCC had no claim, provable or otherwise, under the letters of credit. Accordingly, this federal question was presented and may necessarily have been decided adversely to Intra by this Court. So as to remove any doubt of the rationale of this Court's affirmance of the order appealed from it is respectfully suggested that the remittitur be amended to provide that this question was presented and passed upon adversely to Intra.

Intra contended that the application of Section 191 rested upon proof of balance sheet insolvency. It is true that the Supreme Court concluded that Intra was insolvent. On the state of this record there is no evidence to support that conclusion. It may be therefore, that this Court ruled that insolvency is not a predicate for the application of Section 191. If this be so, we request that the remittitur be amended to include a provision that Intra presented to this Court the question of whether insolvency was a necessary predicate for the application of Section 191 and that this Court decided such question adversely to Intra.

Intra contended that the compromise constituted an unconstitutional breach by the United States of the Beirut Protocol. If this Court had agreed with Intra's contention it would necessarily have had to reverse the order appealed from. Accordingly, such constitutional and federal question was presented and this Court necessarily decided it adversely to Intra. The remittitur should therefore be amended in that respect.

Conclusion

Reargument should be granted and on reargument the order appealed from should be reversed, pre-trial discovery should be directed, and a full-scale trial on the issue of the settlement should be directed to be held before the Court or an official referee.

In the alternative the remittitur should be recalled and amended as requested by Intra.

Respectfully submitted,

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